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FILED
SEP 10 1998
OFFICE OF THE CLERK

No. 98-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

R. M. SMITH,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit improperly decided that the Postbaccalaureate Bylaw was a reasonable restraint of trade and commerce where the court omitted the third step of the rule of reason to determine if any legitimate goals could have been achieved in a substantially less restrictive manner when the NCAA could have regulated the transfer of graduate student-athletes rather than completely exclude them from participating in intercollegiate athletics?

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Petitioner respectfully requests that this Court grant the petition because the NCAA's denial of Petitioner's athletic-eligibility restrains trade and commerce in violation of the antitrust laws. To determine if the restraint is unreasonable, courts utilize the rule of reason, which is a three part test. See I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, at 53 (4th ed. 1997) (citing cases). The Third Circuit omitted the necessary third step of the test, which is an incorrect statement of law. Thus, the lower court's determination that the Postbaccalaureate Bylaw is reasonable was improper.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT IMPROPERLY STATED THE RULE OF REASON BY OMITTING THE INQUIRY INTO WHETHER ANY LEGITIMATE GOALS COULD HAVE BEEN ACHIEVED IN A SUBSTANTIALLY LESS RESTRICTIVE MANNER.

To determine if the alleged infringer's actions violate the Sherman Act courts utilize the rule of reason to focus "on the challenged restraint's impact on competitive conditions." National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978). Competition is assumed to be the best method to allocate resources and to produce the best products and services and lowest prices. Id., at 695. In this analysis, inquiring into whether the competition is good or bad is precluded. Id.

The rule of reason is *three* part test with shifting burdens of proof. See I ABA Section of Antitrust Law, Antitrust Law Developments, at 53 (4th ed. 1997) (citing cases) (emphasis added). First, the plaintiff has the burden to demonstrate evidence of the defendant's market power or actual anticompetitive effects. See Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998), *petition for cert. pending, No. 97-2004*; Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1996); Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996); United States v. Brown

University, 5 F.3d 658, 668 (3d Cir. 1993); see also I ABA Section of Antitrust Law, supra, at 53, 55 (citing cases). Then, the burden shifts to the defendant to show that the alleged infringing conduct promotes a procompetitive objective. See Law, 134 F.3d at 1019; Clorox, 117 F.3d at 56; Hairston, 101 F.3d at 1319; Orson, 79 F.3d at 1367-68; Brown Univ., 5 F.3d at 669; see also I ABA Section of Antitrust Law, *supra*, at 53, 66 (citing cases). To prevail, the plaintiff must show that the restraint is not reasonably necessary to achieve the stated objective or the goal could have been achieved in a substantially less restrictive manner. See Law, 134 F.3d at 1019; Clorox, 117 F.3d at 56; Hairston, 101 F.3d at 1319 (finding that the players were unable to produce any evidence that the legitimate goals could have been achieved in a substantially less restrictive manner); Orson, 79 F.3d at 1368; Brown Univ., 5 F.3d at 669; see also I ABA Section of Antitrust Law, *supra*, at 53, 66 (citing cases).

The Third Circuit explained that the Postbaccalaureate Bylaw achieves the legitimate goal of "permit[ting] survival of amateur athletics and an even playing field." Pet. App. 14a. The court, however, did not address the third prong of the rule of reason to determine if this goal could have been achieved in a less restrictive manner. Thus, the Third Circuit misstated a rule of law by omitting a necessary step in the analysis.

Under the proper analysis, Petitioner's complaint should

not have been dismissed for failure to state a claim because she alleges that significantly less restrictive alternatives could have been utilized. See Pet. App. 50, ¶28. During Petitioner's denial of eligibility, other NCAA bylaws provided rules for governing student-athlete transfers from two-year schools to four-year schools and between four-year schools (Pet. App. 72a-77a), but provided for blanket denial of eligibility to graduate students who transferred to other schools (Pet. App.87a).

To evidence a less restrictive alternative, NCAA has since changed the bylaw to permit graduate students who transferred to the new institution on or after August 1, 1996 to transfer and remain eligible when rules regulating the other transfers are followed. See Pet. App. 87a-88a. Under the rules governing non-graduate transfer students, the athletic director at her undergraduate school would have to release a student's eligibility to participate at another institution in the first year after transferring. If eligibility is not released, a student-athlete is required to "sit out" of competition for one year before regaining eligibility. Thus, the NCAA could have achieved any legitimate goals through this limited regulation, which is a substantially less restrictive alternative than completely eliminating graduate students from participation in intercollegiate athletics and competition for scholarship awards.

Respondent's claim (Br. Opp. 7) that "[t]he restriction . . . is tightly linked to the identification of college sports with an undergraduate 'academic tradition,'" must fail for two primary reasons. First, the NCAA does not limit is participants to only undergraduate students; graduate students are eligible to compete in intercollegiate athletics but only at their undergraduate degree conferring institution. See 1.3 Fundamental Purpose (Pet. App. 69a-70a); 14.1.8.2 Postbaccalaureate (Pet. App. 70a). Second, the NCAA's basic purpose in maintaining intercollegiate amateur athletics is to be "an integral part of the educational program," and this is exactly the activity in which graduate students participate. See 1.3.1 Basic Purpose (Pet. App. 69a).

Next, the NCAA incorrectly contends (Br. Opp. 8-9) that Petitioner suffered no economic harm. Here, the Petitioner suffered an individual economic impact through the loss of scholarship opportunity.[1] Similar to when football players were denied eligibility, the court analyzed the players' limitation of scholarships and denial of a right to compete in the coveted

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[1]Athletes can receive a full scholarship which pays for all tuition, room, board, books, and other expenses. In 1995-1996, the University of Pittsburgh women's volleyball team had twelve full scholarships but only eleven team members on the roster. Thus, the denial of Petitioner's opportunity to obtain scholarship for this particular year had an obvious adverse impact greater than $20,000 after tax or $30,000 pre-tax.

post-season bowls to determine that significant anticompetitive effects resulted rather than from the perspective of the university's revenue reduction. Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996).

In Law, *supra*, the NCAA restricted part-time coaching salaries to $16,000 per year. Similar to Petitioner's denial of eligibility which artificially increased her tuition cost, the coaches were prevented from receiving thousands of dollars for their services, and the price for coaching services were artificially lowered. Id., at 1020. After analyzing the restraint's impact in conjunction with the legitimate goals of retaining entry level positions, reducing costs, and maintaining competitiveness, the Tenth Circuit determined that the NCAA violated the antitrust laws because the imposed restriction neither was the least restrictive method nor proven to necessarily achieve these goals. Id., at 1021-24.

Thus, this Court should grant Petitioner's Writ because the Third Circuit's alternative basis for granting dismissal of the complaint is incomplete and incorrect.[2] Moreover, the proper analysis affects the disposition of the case.

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[2] As discussed (Pet. 8-23), student-athletes are persons in commerce, and when taken as a whole, they have a substantial impact on interstate commerce. Thus, the primary basis for the lower court's opinion to exempt the NCAA's regulation of student-athletes is incorrect, and this regulation is subject to antitrust scrutiny.

II. THE THIRD CIRCUIT'S EXCLUSION OF A STUDENT ATHLETE'S ELIGIBILITY CONFLICTS WITH THIS COURT AND OTHER CIRCUITS AND PRESENTS AN IMPORTANT UNANSWERED QUESTION.

The NCAA recognizes (Br. Opp. 6) that this Court approves of regulatory controls that *foster* competition. See NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 117 (1984). Here, however, the NCAA is destroying competition by eliminating a student-athlete for academic achievement. Requirements to attend class and maintain a minimum grade point average are academic prerequisites uniquely tied to being a student-athlete in intercollegiate athletics. See Br. Opp. 6. Denying a student athlete's eligibility because she advanced into graduate programs in 2.5 years in not a reasonable restriction to protect the existence of the product.

Although other courts may not have addressed the specific bylaw at issue here, the denial of student-athlete eligibility and scholarship based on NCAA bylaws has been reviewed by other circuit courts. See Hariston, *supra* (analyzing ban on post season bowl participation and reduction in scholarship based on bylaw infraction under rule of reason); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (addressing standing issue not determining if NCAA regulations of student-athletes exempted from antitrust regulation). See also Hairston v. Pacific 10 Conference, 893

F.Supp. 1485 (W.D.Wash. 1994); Justice v. NCAA, 577 F.Supp. 356 (D. Ariz. 1983); Gaines v. NCAA, 746 F.Supp. 738 (M.D. Tenn. 1990). These opinions conflict with the Third Circuit's blanket exemption from antitrust regulation.

To bolster the need for judicial scrutiny, even member institutions have acknowledged that too many bylaws exist. "We have far too many rules," said Jim Delaney, who is the Big Ten Conference Commissioner. Mark Asher and C. Jemal Horton, *NCAA Reassesses Future After $67 Million Judgment; Additional Lawsuits Could Alter College Sports*, WASH. POST May 12, 1998, E01. If the NCAA has been unable to govern itself and the courts will not intervene, the Association has no incentive *not* to serve its own interests to the detriment of intercollegiate athletics.

CONCLUSION

The petition for writ of certiorari should be granted to ensure that intercollegiate athletics is the best product and students are not denied thousands of dollars in athletic scholarship. The Third Circuit incorrectly surmised its decision on a limited pre-discovery record to grant the NCAA a complete exemption from antitrust scrutiny in regulating student-athletes. Petitioner respectfully requests that this Court grant her writ to review the Third Circuit's analysis and resolve the conflicting circuit opinions.

Respectfully submitted,

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September 1998